PERSONAL EXPLANATION

HON. HERBERT H. BATEMAN

OF VIRGINIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, June 26, 1996

Mr. BATEMAN. Mr. Speaker, I rise today to inform my constituents of my position on eight rollcall votes I missed on June 10 and 11, 1996, because of the primary election in Virginia's First Congressional District. Had I been present, my votes would have been recorded as follows: Rollcall Nos. 222, ''aye''; 223, ''aye''; 224, ''aye''; 225, ''aye''; 226, ''nay''; 227, ''nay''; 228, ''aye''; 229, ''aye.''

CONSERVATIVE ADVOCATE DEFENDS SUPREME COURT COLORADO OPINION

HON. BARNEY FRANK

OF MASSACHUSETTS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, June 26, 1996

Mr. FRANK of Massachusetts. Mr. Speaker, when the U.S. Supreme Court upheld the decision of the Colorado Supreme Court invalidating a Colorado law which put gay men and lesbians at a particular disadvantage with regard to antidiscrimination legislation, a number of people on the right responded with stirring denunciations of the Supreme Court majority. And Justice Scalia wrote an angry and poorly reasoned dissent in which he denounced the majority and misrepresented their decision. I was therefore particularly pleased to read a thoughtful, reasoned defense of the Supreme Court majority opinion which upheld the Colorado Supreme Court's rejection of this law as an unconstitutional effort to impose special burdens on lesbians and gay men, written by Clint Bolick. Mr. Bolick is a very prominent advocate of the conservative position on legal issues, and serves as the Litigation Director at the Institute for Justice in Washington. As the printed article notes, the Institute itself has no position on the Supreme Court decision in this case.

Mr. Bolick's article is an example of intellectual honesty and integrity because as he notes, he does not favor laws that protect gay men and lesbians against discrimination, but unlike many others—on both sides of the ideological spectrum—he does not allow his public policy preference to cloud his analysis of the underlying legal and constitutional principles that are at stake. Because this is an issue of great importance to the country, and because the Supreme Court majority opinion has been so grievously misrepresented by Justice Scalia and by many Members of this body, I ask that Clint Bolick's very sensible discussion be printed here.

[From the Los Angeles Daily Journal, June 4, 1996]

''ROMER'' COURT STRUCK A BLOW FOR INDIVIDUALS AGAINST GOVERNMENT

(By Clint Bolick)

Reaction to the U.S. Supreme Court's opinion striking down Colorado's Amendment 2 predictably was morally charged: Generally those who disapprove of gay lifestyles reviled it; those who don't liked it. The superficial reaction overlooks the decision's deeper implications, which go far beyond gay rights. For the court may have recognized in the Constitution's equal protection guarantee significant new restraints on majoritarian tyranny.

I anticipated the court's ruling in Romer v. Evans with decidedly ambivalent feelings. I hold the classic libertarian position toward gay rights: An individual's sexual orientation is a private matter, and properly outside the scope of governmental concern. But I also cherish freedom of association and believe people should be free to indulge their moral judgments about other people's lifestyles and proclivities, even though I do not share those judgments.

The Amendment 2 case presented a libertarian conundrum. On one hand, Colorado municipalities were adopting gay rights ordinances that interfered with freedom of association, adding sexual orientation to other ''protected categories'' such as race and gender on which private discrimination is prohibited. On the other hand, Amendment 2 singled out gays for hostile treatment under law, rendering them alone incapable of attaining protected-category status through democratic processes.

So in my view the case was a close one. But in the end the Supreme Court's 6-3 majority got it exactly right: Amendment 2 was impermissible class legislation. ''Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection,'' declared Justice Anthony Kennedy for the majority, ''is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.''

Noteworthy is what the court did not do. It did not, contrary to some analyses, recognize gays as a ''protected class'' or apply heightened judicial scrutiny. It was the state that defined the class and subjected it to adverse treatment under law.

What the court did was to breathe new life into the equal protection guarantee. Since the New Deal, the court generally has invalidated legislative line-drawing only when it involves a ''suspect classification'' (such as race) or a ''fundamental'' right (such as voting or free speech). Most other governmental classifications need have only a ''rational basis'' to survive judicial scrutiny.

As first-year law students learn, ''rational-basis'' review almost always translates into carte blanche deference to government regulators. That means a green light for nakedly protectionistic laws, particularly in the economic realm.

In recent years, my colleagues and I have managed successfully under the rational-basis standard to challenge the District of Columbia's ban on street-corner shoeshine stands and Houston's anti-jitney law. But challenges to Denver's taxicab monopoly and to Washington, D.C.'s cosmetology licensing scheme on behalf of African hair-braiders were dismissed under rational basis, even though the regulations were aimed at excluding newcomers. For those entrepreneurs, the judicial abdication rendered equality under law a hollow promise.

Such class legislation was of paramount concern to the Constitution's framers, who worried about the power of ''factions'' to manipulate the coercive power of government for their own ends.

The Colorado amendment is a textbook example of class legislation. ''Homosexuals, by state decree, are put into a solitary class with respect to transactions and relations in both the private and governmental spheres,'' Justice Kennedy remarked. Amendment 2 ''imposes a special disability on those persons alone.''

In such instances, reflexive deference to governmental discretion would nullify constitutional freedoms. So the court required the government to show that its classification in fact was rationally related to a legitimate state objective. As Justice Kennedy declared, ''The search for the link between classification and objective gives substance to the Equal Protection Clause.''

In this case, the state justified its classification on grounds of freedom of association and conserving resources to fight discrimination against other groups. But as the court concluded, ''The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them.''

Contrary to Justice Antonin Scalia's dissent, the ruling does not mean the community cannot enforce moral standards. It merely must make its rules applicable to everyone. The state can prohibit various types of conduct, it can refrain from adding gays to the list of specially protected classes—indeed, it can cast its lot with freedom of association and eliminate all protected classes. What it cannot do is to impose a distinctive legal disability upon a particular class, unless it can demonstrate legitimate objectives advanced through rationally related methods.

Nor should equal protection depend on whose ox is gored. The same government that can impose legal disabilities upon gays can inflict them upon veterans, or the disabled, or home-schoolers, or entry-level entrepreneurs, or any other class targeted by those who control the levers of government.

The court's decision in Romer v. Evans is the latest in an important but unremarked trend in which the Supreme Court has revitalized constitutional limits on government power in a variety of contexts. Exhuming the Fifth Amendment's ''takings'' clause, it has protected private property rights against overzealous government regulation. Last term, for the first time in 50 years, it invalidated a federal statute as exceeding congressional power under the interstate commerce clause. It has extended First Amendment protection to religious and commercial speech. And under the equal protection clause, it has sharply limited government's power to classify and discriminate among people on the basis of race.

Alexis de Tocqueville observed that ''the power vested in the American courts of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.'' Largely unheralded, the current Supreme Court has become a freedom court. Though comprising shifting majorities, the court seems quietly to be constructing a constitutional presumption in favor of liberty—precisely what the framers intended.

PITFALLS OF THE MEDIA BUSINESS IN ASIA

HON. JULIAN C. DIXON

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, June 26, 1996

Mr. DIXON. Mr. Speaker, I rise to share with my colleagues the recent remarks of Marc Nathanson of Los Angeles, who was confirmed in August 1995 as a member of the Broadcasting Board of Governors of the United States Information Agency. Mr. Nathanson spoke on June 4 at the 1996 Business in Asia Media and Entertainment Conference in Los Angeles. The conference was sponsored by the Asia Society, the national nonprofit educational organization dedicated to increasing